7-1-1976

Robert Alexander, d/b/a Bosque Bonita Farm v. Samuel D. Hinkle

Appellee's Brief 1976-SC-0405

APPELLEE'S BRIEF

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SUPREME COURT OF KENTUCKY

File No. 76-405

ROBERT ALEXANDER, d/b/a BOSQUE BONITA FARM - - - - - - Appellant

versus

SAMUEL D. HINKLE - - - - - - Appellee

Appeal from Woodford Circuit Court

BRIEF FOR APPELLEE

EDWARD S. BONNIE
BROWN, TODD & HEYBURN
1600 Citizens Plaza
Louisville, Kentucky 40202
Counsel for Appellee

Copies of the foregoing Brief for Appellee were mailed first class U. S. Postage prepaid, on the 30 day of June, 1976, to Hon. Robert Hall Smith, Judge, Woodford Circuit Court, Courthouse, Versailles, Kentucky 40383; and Hon. Joseph L. Arnold, 1300 First National Bank Building, Lexington, Kentucky 40507, Counsel for Appellant.

Counsel for Appellee

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF CONTENTS AND AUTHORITIES

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The questions are not correctly stated by Appellant. Question A found on page v of Appellant's Brief has been restated by the Appellee so that the Supreme Court can grasp the issue before it without being required to read the record to search for the real issue.

Questions B and C, found on page v of Appellant's Brief, are totally without basis. The record shows that Appellant introduced no evidence by avowal or in any other fashion to show the physical condition of the horse "Fuldon" at any time after October 27, 1970 or any evidence whatsoever that "Fuldon" was physically unsound as referred to in Question C. Counsel for Appellant introduced and referred to no evidence in the trial by avowal or at the hearing on Appellee's Motion to Suppress immediately prior to trial, to show that the horse "Fuldon" was physically sound or unsound at any time after October 27, 1970, the date that Appellee returned said horse to training.

SUPREME COURT OF KENTUCKY

File No. 76-405

ROBERT ALEXANDER, d/b/a BOSQUE BONITA FARM - - - - - *Appellant*

v.

SAMUEL D. HINKLE - - - - *Appellee*

APPEAL FROM WOODFORD CIRCUIT COURT

BRIEF FOR APPELLEE

May it please the Court:

COUNTERSTATEMENT OF THE CASE

I. Introduction and Summary of Counterstatement

A. COMPLAINT, PRE-TRIAL PROCEDURES, AND ORDERS

After the Appellee filed his Complaint and the Appellant filed his Answer denying all allegations, the Appellee began pre-trial discovery. On February 24, 1975 Appellee served interrogatories upon Appellant designed to furnish Appellee with sufficient pre-trial facts as well as the names of expert witnesses and the summary of the grounds for the opinions of said expert witnesses to enable the Appellee to properly prepare for trial (Tr. 17 through 22). On March 25, 1975

the Appellant furnished incomplete answers to Appellee's interrogatories (Tr. 27 through 30).

On April 4, 1975 Appellee moved the Woodford Circuit Court to require Appellant to furnish complete answers to Appellee's interrogatories and in particular to comply with Rule 26.02(A)(a) which required Appellant to furnish the subject matter upon which each expert was expected to testify as well as the substance of the facts and opinions and a summary of the grounds for each opinion. On April 4, 1975, the Woodford Circuit Court entered an Order requiring the Appellant to furnish Appellee with complete responses to the questions which were the subject of Appellee's Motion on or before May 1, 1975 (Tr. 33).

On May 1, 1975 Appellant furnished Appellee additional responses to Appellee's interrogatories of February 25, 1975 (Tr. 34 through 36). These additional responses to Appellee's interrogatories violated the Woodford Circuit Court's Order of April 4, 1975 in that they did not furnish the information requested by Appellee. Further, the additional response of Appellant on June 10, 1975 (Tr. 47 through 48) listing the names of witnesses to be used by Appellant five days later at the trial which was set for June 16, 1975 (Tr. 26) did not cure the failure of Appellant to comply with the Woodford Circuit Court's Order of April 4, 1975 to furnish Appellee the evidence requested by May 1, 1975.

The Appellant had not furnished complete and appropriate answers to Appellee's interrogatories and had violated the Order of the Woodford Circuit

Court to furnish Appellee with the requested information. Appellee filed with the Woodford Circuit Court immediately prior to the beginning of said jury trial on June 16, 1975 a Motion asking the Woodford Circuit Court under Rule 37.02 and Rule 37.04 to issue an Order limiting the proof of the disobedient Appellant and prohibiting him from introducing the testimony of witnesses whose names, opinions and the facts supporting the opinions, could have been furnished to the Appellee by March 25, 1975 and most certainly by May 1, 1975 (Tr. 60 through 64).

Woodford Circuit Court granted Appellee's Motion regarding the witnesses whose names were not furnished Appellee until June 11, 1975 except to the extent that the testimony of these witnesses could be taken from thoroughbred racing records which are a matter of public knowledge and available to both parties in this action (Tr. b and c).

Appellee also filed another motion on the morning of the first day of the trial. This was a Motion to Suppress Evidence (Tr. 50 through 52). After submission of this Motion and the argument of this Motion as well as the aforementioned motion in chambers prior to the beginning of said jury trial and review of the law, the Woodford Circuit Court entered the Order previously referred to and found in the transcript (Tr. a, b, and c). This Court's attention is directed to the language in the Woodford Circuit Court's Order wherein the Court held:

> ". . . it being admitted between the parties that bone chips were found in the horse's legs or

other parts of his anatomy that expert testimony would show could have been an interfering cause as to the quality of the horse's racing."

Counsel for Appellant made no objection to this portion of the Court's ruling nor did counsel for Appellant object to that portion of the Court's ruling which indicated that the Court had heard evidence of intervening causes that might have affected the quality, good or bad, of the horse's racing career (Tr. b).

The Court admonished the Jury regarding this issue in the following manner:

"Judge Smith: I think at this point I would admonish the Jury at this point. Ladies and Gentlemen: Prior to the commencement of this trial, we had arguments and evidence heard in chambers which off the record accounts for the long delay in our getting started, but it was determined that the value of the damage to this horse, if any, will be determined as the difference, if any, between the market value of this horse immediately before the firing in question and immediately after October 27, 1970, when the horse again resumed his racing. The horse did resume his racing but the jury will not be advised as to the amount or the success or the lack of success of this horse's racing after he resumed it inasmuch as it is the opinion of the Court that certain intervening causes could exist that might have improved or not improved or in fact damaged the excellence of this horse at a later time, it being too remote, therefore, in time and too speculative, the inquiry of the jury will be confined to the difference in the market value between the horse, immediately before the firing, and its value on the 27th of October. You may proceed, Mr. Arnold. I did

> mention to the jury that the horse did race after that but it is not material nor within the range of your decision the number of times he raced or how well or how poorly he raced after that date" (Tr. s and t).

Counsel for Appellant did not object to that portion of the Court's Order which denied Appellant the right to use the witnesses named in the Court's Order except as to matters within thoroughbred racing records which were a matter of public knowledge (Tr. c and d). It is also appropriate at this time to point out to the Court that the testimony of John H. Clark (one of the witnesses named in the Judge's Order whose avowal testimony was limited to matters of public knowledge in thoroughbred racing records) contained no evidence whatsoever regarding the physical condition of the horse "Fuldon" at any time (Tr. 365 through 370). Appellant introduced no evidence by any fact witness or expert witness at any time during the trial of this case relating to the physical condition of the horse after October 27, 1970 during the course of the presentation of Appellant's evidence (Tr. 267 through 359) or by the avowal of John H. Clark (Tr. 365 through 370).

The Court allowed Appellee to amend his Complaint on the morning of trial to reduce the value of said horse prior to the damage occasioned by the negligence of the Defendant from $50,000 (Paragraph 5, Appellee's Complaint, Tr. 2, 3) to $30,000. (See final sentence in Woodford Circuit Court's Order, Tr. c.)

B. SUMMARY OF EVIDENCE AT TRIAL

The trial of said action began on June 16, 1975 and continued until June 18, 1975 in the Woodford Circuit Court before the Honorable Robert Hall Smith, Circuit Judge.

During the course of the trial, evidence was introduced by Appellee that Appellant Alexander accepted the three-year old thoroughbred colt "Fuldon" on or about May 9, 1970 from the Appellee and that Appellee had agreed to pay and had paid the Appellant for training said thoroughbred horse and that thereafter said horse was injured while in Appellant's possession (Tr. 26 through 69). Dr. Craig Frank, a veterinarian, testified that he had been employed to "fire" the horse "Fuldon" and that he had asked the Appellant several times if the ankles of "Fuldon" were to be fired and that the Appellant had answered "Yes" several times (Tr. 139 through 140). Tommy Rankin, an employee of the Appellant testified that the horse "Fuldon" had a "splint" (Tr. 162) and that there was nothing wrong with "Fuldon's" ankles (Tr. 163) and that the Appellant was aware of that fact.

The jury found that the Appellant had failed to prove by a preponderance of the evidence that the injury to "Fuldon" had not resulted from his negligence or the negligence of his employees (Tr. 71 and 75) and that the value of "Fuldon" before he was negligently fired was $25,000 and that his value on October 27, 1970 after the firing incident and his recuperation was $15,000, a difference of $10,000 (Tr. 75). Testimony of witnesses for the Appellee on values ranged

from a fair market value for the firing incident on June 26, 1970 from a low of $25,000 testified to by expert witness Jack Jones (Tr. 228) to a high of $40,000 testified to by Richard Hazelton (by deposition upon written question (Tr. 44)). The value of "Fuldon" after the negligent firing and after it had recuperated to the extent that it could, namely October 27, 1970 when it was returned to training, ranged from a low value of $7,500 placed upon it by Appellee's expert witness, Jack Jones (Tr. 236), to a high evaluation of $10,000 placed upon it by the Appellee (Tr. 67).

The only witness for Appellant who testified regarding the damage to the horse "Fuldon" and the fair market value before the accident on June 26, 1970 and the horse's value on October 27, 1970 was John H. Clark. John H. Clark testified that "Fuldon" was worth $15,000 on August 15, 1969 (Tr. 343); that it was worth $15,000 on June 26, 1970 immediately before he was fired (Tr. 348) and worth $15,000 on October 27, 1970 (Tr. 347) a time at which it had recuperated to the extent it could and was returned to training.

C. INSTRUCTIONS AND VERDICT

The Appellee tendered instructions to the Woodford Circuit Court at the beginning of the jury trial on June 16, 1975 (Tr. 53 through 59) accompanied by the authorities in support of said tendered instructions. Instructions were tendered on bailor-bailee responsibility, expert witnesses, hypothetical questions, measure of damages (Tr. 57 through 58) and reading of deposi-

tions. Appellant did not tender to the Court any instructions at the beginning of said trial.

The Court tendered instructions to the jury on bailor-bailee responsibility, agency, negligence and damages (Tr. 71 through 74).

Instruction Number 3 related to damages and is found in the transcript on page 73. This Instruction was not objected to by counsel for Appellant (Tr. 424, 425) and counsel for Appellant did not submit a damage instruction of any kind whatsoever. Since Appellant's defense theory in this case was that the horse "Fuldon" had sustained no damage because his ability to race was not impaired, Appellant submitted no damage instruction (see counsel for Appellant's remarks, Tr. 424, lines 24 and 25 and Tr. 425, lines 1 through 4).

The verdict of the jury was within the proof and in accordance with the instructions of the Court (Tr. 75, 76).

D. POST-TRIAL MOTIONS AND ORDERS

After Judgment in favor of the Appellee in the amount of $10,949.80 was entered on June 21, 1975, Appellant made a Motion for New Trial alleging, among several grounds, that the Court had ruled improperly regarding the admissibility of evidence to establish damages for injury to the horse "Fuldon" (Tr. 79 through 82). Appellant's Motion for a New Trial was argued orally on August 7, 1975 before the Honorable Judge Robert Hall Smith and counsel for Appellant and Appellee submitted Memoranda of Law

regarding the Court's ruling on the admissibility of evidence to substantiate the damage to the horse "Fuldon".

The issue before this Court was fully briefed for the Woodford Circuit Court by Appellant in his Memorandum, a copy of which is found in this transcript (Tr. 94 through 99). Appellee's Memoranda on the same issue which is before this Court, is also found in the transcript. Appellee submitted two Memoranda on the very issue which is before this Court. The first Memorandum is found on pages 100 through 103 of the transcript. Only Issue I of this Memorandum is pertinent since Appellant only appealed on one of the issues which he argued in his Motion for a New Trial. A Supplemental Memorandum was filed by Appellee on the specific issue which is before this Court (Tr. 87 through 90).

After reviewing the Memoranda submitted by counsel for Appellee and Appellant, on November 17, 1975 the Court denied Appellant's Motion for a New Trial (Tr. 144). No new arguments have been advanced in this Court by Appellant in his Brief and the authorities cited by Appellant in support of his appeal are the same authorities cited and argued before Judge Robert Hall Smith in the Woodford Circuit Court.

ARGUMENT

A. Did the Woodford Circuit Court Err in Denying the Appellant the Right to Introduce Evidence of the Racing Performance of the Horse "Fuldon" After October 27, 1970?

Appellee has restated Question A of the Appellant. Appellee believes that Question A which is quoted herein below inaccurately states the ruling of the Woodford Circuit Court from which Appellant appealed:

> "A. Whether the Woodford Circuit Court erred in denying the Appellant the right to prove by his witnesses, all of the facts relating to the horse 'Fuldon', from the date it was 'fired', or, June 26, 1970, throughout his entire racing career."

As can be immediately seen from the ruling of the Woodford Circuit Court found on pages a, b, and c of the transcript and on pages 5 and 6 of Appellant's Brief, Judge Smith did not deny Appellant the right to prove by his witnesses any of the facts relating to the horse "Fuldon" from the date it was fired or June 26, 1970 up to and including the date October 27, 1970 when the horse was returned to racing. In fact, the Appellant introduced the testimony of Dr. Delano Proctor, a veterinarian, who testified that he had given the horse "Fuldon" post-operative care after June 26, 1970 and he expressed his opinion regarding the condition of "Fuldon" at that time (Tr. 267 through 276).

Appellee presented two motions to the Court on the morning of the first day of said trial, these motions have been referred to earlier in this Brief and were argued and ruled upon by Judge Smith at the beginning of the trial. Appellee submitted to the Woodford Circuit Court its motion asking the Court to refuse the admissibility of the testimony of certain witnesses and submitted a Memorandum of Law with said Motion which is found in the transcript on pages 63 and 64.

Under Rules 37.02 and 37.04 of the Kentucky Rules of Civil Procedure the Woodford Circuit Court had the discretion to issue an order limiting the proof of a disobedient party and prohibiting him from introducing designated matter in evidence (See Rule 37.02(2)(B); 37.04(1); and *Naive* v. *Jones,* Ky., 353 S. W. 2d 365 (1961).)

Two recent cases of the Supreme Court of Kentucky affirmed the trial court judge's right to issue orders penalizing disobedient parties for transgressions of the rules of civil procedure and of the orders of its courts. In point is the case of *Baltimore & Ohio Railroad Co.* v. *Carrier,* Ky., 426 S. W. 2d 938 (1968). In said case the judge entered a default judgment against the defendant for failure to answer the interrogatories within the time required. Appellee, in the case before this Court, simply asked the Woodford Circuit Court to refuse the admissibility of testimony of witnesses whose names, opinions and the facts supporting the opinions could easily have been furnished to the Appellee by March 25, 1975 and most certainly by May 1, 1975. In a more recent Kentucky case, *Spradling* v. *Boone County Planning Commission,* Ky., 461 S. W.

2d 548 (1970), the court dismissed plaintiff's action and stated, among other things, "the court has adopted the policy of strict compliance (to the rules) in the belief that the legal profession should by now be adequately informed on these rules." The court stated further that if a person requested to answer needs additional time, that the time may be enlarged by the court if the request is made before the expiration of the period originally prescribed. Appellant made no such request to the Woodford Circuit Court.

The counsel for Appellant made no objection to this portion of Judge Smith's ruling (Tr. c, d). Appellant's objection was only directed to the refusal of the Court to allow evidence of his racing performance after October 27, 1970 to be introduced. The Court made this ruling after argument in chambers and the agreement of counsel, which was expressed in the Court's ruling that bone chips had been found in the horse "Fuldon's" legs or other parts of his anatomy, that expert testimony would show could have been an intervening cause as to the quality of the horse's racing (Tr. a, b). The Appellant, having admitted the existence of an intervening cause, i.e., bone chips in "Fuldon's" legs, produced no witnesses by avowal to contradict this judicial admission.

So, the Appellant admitted an intervening cause which occurred after October 27, 1970 and which could have affected his racing career. He was not denied the right to introduce any proferred facts relating to the horse "Fuldon" up to October 27, 1970 and he did not attempt to introduce any facts other than the racing

performance of the horse through the witness, John H. Clark, after October 27, 1970. It is for these reasons that Appellee believes that Appellant has misstated Question A.

Having restated Question A so that this Court can more clearly analyze the ruling of the Woodford Circuit Court, Appellee will demonstrate that Appellant has misunderstood the nature of the ruling of the Woodford Circuit Court.

The Appellant has misunderstood the relationship between the damage instruction which the Woodford Circuit Court gave the jury (Tr. 73) and its ruling on the admissibility of the racing performance of the horse "Fuldon" after October 27, 1970 (Tr. a, b, & c). Since the damage instruction given by the Court was not objected to by Appellant and no damage instruction was tendered by the Appellant, the correctness of the damage instruction tendered by the Woodford Circuit Court to the jury is not an issue before this Court. Appellee argued before the Woodford Circuit Court that the Appellant should not be allowed to introduce evidence as to the fair market value after the negligent injury to the horse "Fuldon" after October 27, 1970 unless he was prepared to prove prior to the introduction of said evidence that the physical condition of the horse at the time he desired to introduce evidence of its value or performance was substantially the same as that on October 27, 1970, the date that the horse had recovered to the extent that it could. Since Appellant had admitted at the pre-trial hearing an independent intervening cause after October 27, 1970 (referred to

in the Judge's Order) the Judge's ruling was clearly correct and in accordance with the law in the state of Kentucky and elsewhere. This law will be referred to hereinbelow.

Judge Smith's ruling was based upon the relevancy and competency of evidence months after the injury (June 26, 1970) and months after the horse's recovery (October 27, 1970) and not on the question of how to ascertain the measure of damages in a lawsuit involving injury to a horse. The affect of Appellant's argument is to ask this Court to extend the period during which damage to a horse can be ascertained from the date October 27, 1970 to the date of trial. Appellant made no objection to the damage instruction. The damage instruction is in complete agreement with Kentucky law and the national law, and that issue isn't before this Court. All the law and the arguments which the Appellant has cited to this Court are on the wrong issue. A brief review of the Memoranda filed by the Appellant in his Motion for a New Trial and Appellee's Memorandum and Supplemental Memorandum heretofore referred to indicate that Appellant's misapprehension of the law at the circuit court level has been perpetuated in Appellant's Brief before this Court.

Appellee moved the Woodford Circuit Court to suppress evidence regarding the racing quality of "Fuldon" as shown by his racing performances in 1971 and years subsequent thereto at all times after October 27, 1970 as related to his racing performance unless the Appellant could show the Court that "Fuldon" was in substantially the same physical condition at the

time of his racing performances as he was on October 27, 1970, the time at which he returned to training. Unless so restricted jury would have been required to SPECULATE as to whether or not "Fuldon's" racing performance was the result of:

(1) The poor racing abilities of "Fuldon";

(2) The accidental firing on June 26, 1970;

(3) An independent intervening cause subsequent to June 26, 1970 caused his poor racing performance.

The Woodford Circuit Court's ruling was correct for the following reasons:

(1) Appellant offered no proof to the Woodford Circuit Court before its ruling on Appellee's Motion to Suppress Evidence or by avowal regarding the physical condition of the horse "Fuldon" after October 27, 1970.

(2) Appellant offered the name of no witness who could testify to the physical condition of the horse "Fuldon" after October 27, 1970.

(3) Appellant admitted prior to trial that bone chips were found in the horse's legs which could have been an intervening cause as to the quality of the horse's racing performances after October 27, 1970.

(4) The Woodford Circuit Court allowed the Appellant to show that the horse did race after he was returned to training on October 27, 1970.

(5) The racing performances offered by the Appellant were too remote in time to bear on the difference in fair market value before June 26, 1970 and on October 27, 1970.

The law in the state of Kentucky is clear that evidence as to value must be excluded unless the proponent of said evidence can show the integrity of the items being valued between the date of valuation and the date at which the offeror of testimony desires to introduce evidence. In the case of *Baltimore & Ohio Railroad Co.* v. *Carrier, supra,* the court held that the trial judge had acted properly when he refused to allow evidence as to value of a boat and trailer by a witness who purchased said equipment almost a year after the date of damage since the offeror of said evidence could not show that the boat was in the same condition when examined by the witness as it was on the date it was damaged. Of the same effect is the case of *Chesapeake & Ohio Railroad Co.* v. *Pitman,* Ky., 166 S. W. 2d 443 (1942) in which it was stated that before proof was competent it must be shown that the physical condition at the time of observance is substantially as at the time of the occurrence. Also to the same effect is the case of *Rollins, et al.* v. *Avey,* Ky., 296 S. W. 2d 214 (1956). This case involved an action for damages resulting from an explosion that occurred within thirty to forty minutes after the installation of a gas floor furnace. The court held that there was no error in excluding testimony of experts that an examination of said furnace eight to ten months after the accident disclosed a defect where there was no showing that the furnace inspected by the experts was in the same condition as it had been immediately after the accident.

These cases make sense and are clearly consistent with the rule of relevancy. This is particularly true

since Appellant admitted that there was an intervening cause, namely, broken bones in "Fuldon's" legs in the winter of 1971 shortly after he had been returned to training. What the Woodford Circuit Court desired to do was to keep the jury's minds centered on the question of fair market value immediately before the accidental firing on June 26, 1970 and his value on October 27, 1970 the time at which he had recovered as much as he was going to. The Judge did admonish the jury on pages s and t of the transcript regarding the elements of damage to the fair market value of the horse. This admonition is quoted in full in Section A of Appellee's Counterstatement of the case.

Authorities cited by Appellant in support of his position that the Woodford Circuit Court erred are taken in every instance from 79 A.L.R. 2d 677-752 and 22 Am. Jur. 2d, *Damages,* §205. Appellant incorrectly cites the A.L.R. 2d citation as 70 A.L.R. 2d 678 instead of 79 A.L.R. 2d 678. Beginning with the case of *Southern Express Co.* v. *Fox & Logan,* 131 Ky. 259, 115 S. W. 184, 133 Am. St. Rep. 241 (1909) all the cases which Appellant has cited deal directly with the method of computing damages to livestock when injured or destroyed. These cases only consider how the difference in fair market value before injury and after injury is computed and not the issue before this Court which is what evidence is admissible to prove the difference in fair market value and the circumstances under which said evidence is admissible. Appellee has no quarrel with the holding in the *Southern Express Co.* v. *Fox & Logan, supra,* case. This is exactly the

instruction which the Woodford Circuit Court gave the jury on damages. In fact, Appellee cited 79 A.L.R. 2d 677, 703, 704 in support of Appellee's tendered instruction on damages (Tr. 57). The Woodford Circuit Court followed Appellee's tendered instruction on damages.

Defendant's counsel cites the Massachusetts case of *Gillett* v. *Western R. Corp.*, 90 Mass. (8 Allen) 560 (1864) for a proposition which is clearly the minority view on damage instructions, namely, allowing the difference in value to be computed by measuring the value immediately before the injury and at the time of trial.

This isn't the Kentucky law on measuring damages. The *Southern Express* case is consistent with the national majority view of measurement of damages in livestock and with the instructions given by the Woodford Circuit Court. Appellant did not argue before the Woodford Circuit Court and does not argue now that this Court's instruction on damages was incorrect. Appellant only argues that competent evidence was excluded in ascertaining the measure of damages. The Appellant seeks to make incompetent and irrelevant evidence competent and relevant by asking this Court to enlarge the damage instruction (to which he made no objection) to include all evidence of any kind up to the date of trial. This isn't the law in Kentucky, was not a part of the Woodford Circuit Court's instructions and Appellant did not object to the Woodford Circuit Court's instructions or submit any measure of damage instruction.

Appellant never attempted by avowal or otherwise to introduce any evidence regarding the physical condition of "Fuldon" after October 27, 1970 but only introduced testimony by avowal that in 1971 as a four-year old, one year subsequent to the alleged firing, "Fuldon" entered three races and did not record any wins, places or shows (Tr. 366) and how he performed in subsequent years. Taking into consideration the superficiality of this type evidence, the admission of an independent intervening cause, and the failure of Appellant to introduce any evidence as to the physical condition of the horse subsequent to October 27, 1970, the Woodford Circuit Court was entirely correct in refusing the evidence of the subsequent racing performance of "Fuldon" after October 27, 1970.

B. Whether the Woodford Circuit Court Erred in Not Permitting the Appellant to Show the Physical Condition of the Horse "Fuldon", From the Date He Was Fired or June 26, 1970 Throughout the Remainder of His Racing Career.

This question is a non-issue. The reason this question is not a legitimate issue is as follows: Woodford Circuit Court refused to allow the Appellant to introduce the testimony of certain witnesses submitted by the Appellant five days before trial in contravention of the Court's Order. Counsel for Appellant did not introduce or attempt to introduce any evidence whatsoever regarding the physical condition of the horse "Fuldon" from July 30, 1970 the date upon which the horse left Dr. Proctor's throughout the remainder of

its racing career. The Appellant never introduced any evidence of "Fuldon's" physical condition from witnesses except D. L. Proctor, a veterinarian. D. L. Proctor testified regarding the physical condition of the horse "Fuldon" beginning on June 28, 1970 and ending on July 30, 1970 (Tr. 267 through 276). John H. Clark testified only from thoroughbred racing records and never saw the horse "Fuldon" at any time whatsoever before the negligent firing on June 26, 1970 or at any time thereafter up to and including the date of trial. Having not tendered any evidence in this regard the Woodford Circuit Court could not have erred in failing to allow the introduction of such testimony.

In an excess of caution, Appellee points out to the Court that the racing record which was introduced by John H. Clark from a computer print out showing the number of races run and the money earned does not in any manner indicate the physical condition of a horse. The horse could be running on drugs which are permitted in many states to alleviate pain and infirmities such as broken bones, sprained tendons and ligaments and the debilitating disease known as bleeding. For the Court to have allowed introduction of the mere racing record without testimony from a veterinarian regarding the physical condition of the horse at the time would have been highly prejudicial under any circumstances. Appellant states that the mere introduction of the racing record of "Fuldon" indicates that the horse was in a "sound condition". Nothing

could be further from the truth. This statement could have only been made by an attorney totally unfamiliar with racing and thoroughbred horses and the ailments attendant thereto.

C. Whether the Woodford Circuit Court Erred in Not Permitting Proof to Be Introduced to Show That the Horse "Fuldon" Was Physically Unsound Before There Were Any Intervening Factors Involved.

Although Appellant has stated in his Brief that the question immediately above is a question to be presented to and decided by the Supreme Court of Kentucky, Appellant has through inadvertence or intentionally, failed to brief this question for the Court. This question is another non-issue because the Appellant never attempted to introduce any evidence that the horse "Fuldon" was physically unsound or sound at any time after July 30, 1970. Other than the Woodford Circuit Court's ruling denying to Appellant the use of the testimony of certain witness for failure to abide by the Court's Order, no ruling was made by the Court denying to Appellant the right to show that the horse "Fuldon" was physically unsound before there were any intervening factors involved. The record shows no objection of the Appellant to the Court's ruling regarding the denial of the right of Appellant to use of testimony of certain witnesses and the record shows no attempt by the Appellant to introduce any evidence other than the mere racing performances of the horse "Fuldon" during the year 1971 and subsequent. No dates of the races in 1971 were given by John H. Clark.

CONCLUSION

The Woodford Circuit Court properly refused to permit the introduction of the racing record of the horse "Fuldon" after October 27, 1970 because the Appellant admitted that bone chips were found in the horse's legs or other parts of his anatomy subsequent to this date which could have been intervening causes regarding the quality of the horse's racing performance and Appellant offered no testimony or proof prior to the trial, during, or after the trial by avowal, that he had any evidence whatsoever regarding the physical condition of the horse "Fuldon" subsequent to October 27, 1970. This being the case the Court was fully justified in applying the law of the state of Kentucky and refuse to allow the jury to receive such evidence. To have allowed the jury to have the superficial evidence of the mere racing performance of "Fuldon" in 1971 and later years would have allowed the jury to speculate on the measure of damages and have introduced for their consideration both irrelevant and incompetent evidence. Accordingly, Appellee respectfully submits that the ruling of the Woodford Circuit Court regarding the admissibility of the 1971 racing performance of "Fuldon" was not an abuse of discretion. Finally, Appellee respectfully submits that the Order of the Woodford Circuit Court in refusing to grant a new trial was correct and that its Order should be affirmed.

Respectfully submitted,

EDWARD S. BONNIE
BROWN, TODD & HEYBURN
1600 Citizens Plaza
Louisville, Kentucky 40202
Attorney for Appellee